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No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PRINCETON UNIVERSITY and STATE OF NEW JERSEY,
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF APPELLANT PRINCETON UNIVERSITY

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REPLY BRIEF OF APPELLANT PRINCETON UNIVERSITY

ARGUMENT

I. PRINCETON UNIVERSITY HAS STANDING TO APPEAL THE DECISION BELOW AND ITS CLAIMS ARE NOT MOOT.

A. Princeton has standing in its own right.

Princeton University appeared before the Supreme Court of New Jersey as intervenor at the invitation of the court (JA

4a; JS 5a).[1] It briefed the issues, appeared at oral argument, and unsuccessfully sought rehearing.[2] Appellee did not object at any stage to Princeton's role in the proceedings. The court below treated Princeton as a party under New Jersey law, and this Court must accept the New Jersey court's determination that state law authorized such participation.[3]

Although intervenor status appears to be somewhat unusual in criminal cases, the right of an intervenor to seek review in this Court of a lower court decision is well-established, having been recognized in both civil[4] and criminal[5] cases. Closely analogous to this case is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). There, a newspaper and two reporters were granted intervenor status by the Virginia trial court for the purpose of raising their First Amendment challenge to that court's order closing a criminal trial to the public. This Court heard and decided the case, with no suggestion that the newspaper, because of its intervenor status, had anything less

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[1] JS ....., JA ....., PB ....., NJB ....., SB ..... and AB ..... refer throughout to the indicated pages of the Jurisdictional Statement, the Joint Appendix, the Brief of Appellant Princeton University, the Brief of Appellant State of New Jersey, the Brief of Appellee Chris Schmid, and the Brief *Amicus Curiae* of American Association of University Professors [AAUP], respectively.

[2] Appellee appears to take comfort from the omission of Princeton's name from caption of the decision below. (SB 9). He does not mention the fact that the caption of the court's order denying Princeton's petition for rehearing designated Princeton as "Intervenor-Movant" (JS 70a).

[3] *See Boston v. Jackson*, 260 U.S. 309, 313 (1922). To the extent appellee urges that the Supreme Court of New Jersey could not under New Jersey law allow Princeton to intervene he is also wrong. While there is no published rule expressly establishing intervention in criminal cases, the New Jersey Constitution (art. VI, § 2, para. 3) empowers the Supreme Court of New Jersey to make rules governing practice and procedure, and the court may exercise this power by case law rather than rule-making process, *see Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 577 (dictum), *appeal dismissed*, 414 U.S. 1106 (1973). *See also* Rule 2:3-2 of the Rules Governing the Courts of the State of New Jersey.

[4] *City of Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958).

[5] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

than the full rights of a party to pursue the matter before this Court.

Rather than accepting the fact that, as intervenor, Princeton was a party below, appellee continues to insist (SB 8-11) that Princeton lacks standing. He attempts to analogize this case to *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), which held that the mother of an illegitimate child lacked standing to seek an order enjoining the district attorney from refusing to prosecute the father for non-support. But the plaintiff's posture in that case was very different from Princeton's posture here.

Princeton does not complain that the State of New Jersey has refused to prosecute appellee—indeed, the State *has* prosecuted him. Nor does Princeton assert a private interest in appellee's being convicted or fined. Princeton's interest is not that the State force appellee to stay off Princeton's property; Princeton's interest is rather that the State *not* require *Princeton* to allow him *on* the property. Acceptance of appellee's defense necessarily gives rise to a corresponding legal obligation on the part of Princeton. No such reciprocal legal obligation was present in *Linda R.S.*

The significance of this fact is underlined by the probability that, given Princeton's full participation as intervenor below, New Jersey courts would hold Princeton estopped from relitigating the constitutional issue.[5a] Accordingly, Princeton should not now be barred from fully litigating its rights before this Court, when this may be its only opportunity to do so.

B. Princeton's claims are not moot.

Appellee argues (SB 12) that Princeton's claim is mooted by revisions to its access policy which Princeton made during the pendency of this litigation. But if this Court reverses the Supreme Court of New Jersey because the ground on which it relied violated Princeton's federal constitutional rights, the New

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[5a] *Cf. Township of Washington v. Gould*, 39 N.J. 527, 189 A.2d 697 (1963); *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Jersey court may reinstate Schmid's conviction for trespass. Moreover, Princeton's intervening revision of its access policy was an assertion, not an abandonment, of Princeton's First Amendment right to determine for itself when members of the general public shall have access to its property and under what circumstances and conditions. It is precisely that right which is at issue here; and to assert that Princeton's revised regulations are more consonant with the New Jersey Constitution as interpreted below and (presumably) that Schmid will comply with them is irrelevant.[6] Princeton cannot be held to have abandoned its constitutional right by exercising it. Furthermore, the decision below chills Princeton's freedom to make additional revisions in its access policy, now and hereafter.

C. The State of New Jersey has properly exercised its right of appeal.

Since Princeton has standing in its own right, it would make no difference to Princeton's standing if the State of New Jersey were, as appellee urges (SB 8), dismissed or realigned as a party. There is, however, no basis for doing so because the State has properly appealed.

Appellee makes two distinct arguments. First, he argues that there is no case or controversy between the State and Schmid. (SB 6-8). This conclusion rests on the fact that the State expresses no opinion on the federal constitutional question other than to attest its substantiality, and on appellee's contention that the State cannot properly appeal unless it can "point to a provision of the United States Constitution that protects the State of New Jersey from itself—*i.e.*, its own Constitution" (SB 7)—a novel argument.

The State believes a substantial constitutional question has been raised by Princeton and therefore has joined Princeton in

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[6] Nor is it clear that the revised regulations are as consonant with the decision below as appellee believes; *e.g.*, the regulations *permit* rather than *require* Princeton to allow representatives of off-campus political or religious groups access to University facilities. (JS 3a n.2).

this appeal. The State is not asserting Princeton's First Amendment rights on Princeton's behalf; rather it is seeking clarification of how those rights affect the State's enforcement of its trespass law. (NJB 4). The State may properly be indifferent to the merits of Princeton's asserted rights, but it cannot be indifferent to enforcement of its own laws. The State may be bound by its supreme court's interpretation of New Jersey law, but it is not bound by that court's interpretation of the Federal Constitution. And merely to seek review by this Court of a federal constitutional interpretation by the court below, the State need not assert some independent constitutional right of its own.

To say there is no case or controversy between the State and Schmid is to assume an answer in Schmid's favor to the federal constitutional question presented. If the provisions of state law as construed and applied below are constitutionally valid, then the State has no power to prosecute. The case or controversy which previously existed is disposed of as a matter of law. If, however, federal law renders the state constitutional provisions invalid, then there remains a case or controversy under state law. The truth or falsity of the assumption depends on this Court's answer to the substantive question presented, which is precisely why the State has appealed. (NJB 4).

Appellee urges secondly that the State somehow lost its standing to appeal when it lost its conviction of Schmid in the court below. He argues that the State cannot "gain standing by asserting itself as representing *parens patriae* those citizens of New Jersey who might wish to challenge the constitutionality of the New Jersey Constitution under the United States Constitution." (SB 7). Obviously the State takes no such position, for the reason that it need not find any new basis for its standing. It appears here, as it appeared below, in its capacity as sovereign enforcing its own criminal statute.

II. STATE ACTION IS CLEARLY PRESENT HERE AS IT WAS IN *PRUNEYARD.*

Schmid argues that Princeton's First Amendment rights were not violated because the required element of state action was not present. (SB 15-18). Schmid, however, misperceives the nature of Princeton's grievance. Princeton does not argue that the failure to uphold Schmid's trespass conviction of itself violates Princeton's First Amendment rights. Rather, it is the action of the Supreme Court of New Jersey in interpreting and applying the state constitution so as to grant Schmid a right of access to the Princeton campus that gives rise to Princeton's federal constitutional claims.

The court below's reversal of Schmid's conviction was based on its construction of paragraphs 6 and 18 of Article I of the New Jersey Constitution. As interpreted by the Supreme Court of New Jersey, those provisions "affirmatively guarantee[ ] to individuals the rights of speech and assembly." (JS 24a). On the basis of that interpretation, the court reversed Schmid's conviction for trespass, concluding that he had "suffered a constitutional impairment of his State constitutional rights of speech and assembly." (JS 33a).

There can be no doubt as to the substance of the court's holding; its effect is to mandate that Princeton allow Schmid access to its grounds for the purposes of distributing literature. It is only on this basis that Schmid's conviction was reversed. Since the decision of the state court necessarily rests upon its rejection of a federal constitutional claim, this Court has jurisdiction. It is equally clear that a state requirement of access, whether the source is found in the state constitution, in a state statute, or elsewhere, is state action.

In this respect, the holding of the Supreme Court of New Jersey is no different from the holding of the Supreme Court of California which this Court reviewed in *Prune Yard Shopping Center v. Robins,* 447 U.S. 74 (1980). There the Supreme Court of California had held that the California Constitution created a right of speech and petition in shopping centers and

had reversed the decision of the lower court which had denied injunctive relief against the shopping center. In reaching its decision, the California court rejected a contention that this state-created right infringed on federal constitutional protections. This Court held that the case properly was before it as an appeal under 28 U.S.C. § 1257(2), and implicitly found the obligation imposed by the state constitution to be state action.

III. APPELLEE DOES NOT DISPUTE THAT PRINCETON IS ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT IN ITS CHOICE OF EDUCATIONAL POLICY.

While both appellee and *amicus curiae* American Association of University Professors take exception to the use of the phrase "academic freedom" to describe Princeton's constitutionally protected educational autonomy, they do not explicitly deny the existence of Princeton's First Amendment right. They simply object to describing this right as "academic freedom" because they contend that history and scholarship give that term a different meaning. They argue that it refers exclusively to the rights of teachers to professional freedom from both state and private intrusion in their teaching, and they perceive any institutional claim to "academic freedom" as derived from, and merely representative of, this individual right of professors; that is, as protecting from governmental interference the teaching freedom of the institution's faculty.[6a] (SB 18-21; AB 2-3, 5, 9-10).

The history and reputation of Princeton as a university attest to its devotion to the pursuit of truth by its faculty and students free from both public *and* private interference. But this case does not involve the internal private rights of either

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[6a] *But see* Comment, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538, 1546-51 (1981) (Courts should recognize, as a corollary to the First Amendment, a right of "institutional academic freedom" which does not exist only to protect individual faculty members' rights).

faculty or students vis-à-vis the university administration.[7] It involves the constitutional right of all elements of the private university—administration, faculty, and students alike—to govern themselves and their relationship with strangers free of state direction and control. Princeton contends that the university, not the state, should determine the rules and regulations which govern the expressive activities of strangers on Princeton's campus, and that doing so in accordance with institutional self-government serves Princeton's educational purposes.

The "academic freedom" which is the First Amendment's "special concern" is freedom from governmental intrusion into the academic process.[8] In a public university, the administration's control over the academic process can be viewed as state action, and in some circumstances may infringe the individual rights of those who teach (and those who learn) to do so without public interference. But the same conceptual problem does not exist in the case of private universities, because the action of the university administration is not state action. However labeled, the right of a private university to determine its educational policy in accordance with its own internal processes without governmental interference stems directly from the First Amendment.[9] While both appellee and

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[7] Appellee states in his Brief that "[h]ere, of course, it is the University administration that claims the right to impose the strait jacket upon its student body." (SB 25 n.10). This is unsupported by anything in the record. And it is a strange argument for appellee to make, in view of his contention that the internal "decision making process is utterly irrelevant. . ." (SB 22 n.9)

[8] We do not dispute that the term is also used, quite properly, in a non-constitutional sense to refer to private interference with teaching. And we wish to emphasize that Princeton agrees with Professor Machlup that academic freedom must be defended "against pressures from all quarters—including professors themselves," and that "trustees and administrators, no less than sovereigns and governors, should share with professors and students in the defense of academic freedom." *See* Machlup, *Some Misconceptions Concerning Academic Freedom,* 41 AAUP Bulletin 753 (1955), *reprinted in Academic Freedom and Tenure* (L. Joughin ed. 1967) at 184.

[9] Of course, Princeton, like any other person, would be bound by any voluntary contractual limitations on its First Amendment rights. When *amicus* AAUP suggests that Princeton would offer its First Amendment rights as a defense to tenure and other breach of contract claims asserted by the faculty (AB 27-28), it grossly misreads Princeton's argument. Here, the state police power is involved.

amicus argue that on the facts of this case "academic freedom" is not an issue, we do not understand them to deny the existence of Princeton's First Amendment right. They do deny that the New Jersey Constitution as interpreted by the court below unconstitutionally interferes with that right. (SB 39; AB 11-16).

The conclusion that confining Princeton to regulating the time, place and manner of strangers' expressive activities on its campus does not interfere with its educational policy is based upon what that policy is. If Princeton encourages student exposure to widely varying viewpoints how can it complain about Mr. Schmid's activities? (JS 29a-30a; SB 34-35). Both appellee and *amicus* concede that other, less catholic, institutions might with reason seek to regulate more than the time, place, and manner of outsiders' activities on campus, but they urge that Princeton cannot assert the claims of others. (SB 12-14, 13 n.6, 21; AB 14-15, 19). That totally misses Princeton's point.

There appears to be no disagreement that the First Amendment protects Princeton's choice of its educational policy. Nor is it suggested that Princeton uses its property for anything other than the implementation of that policy, the realization of educational goals. The fact that Princeton is committed to exposing students to widely different viewpoints does not give its educational choice less constitutional protection than a narrower or more doctrinaire one.[10] Conceding that less catholic educational institutions might have reason to object to the decision below, appellee adjudges their objections

[10] Nor would that choice in and of itself compel Princeton to admit Mr. Schmid to express his views on its campus. Implementation of that choice through an invitational rule avoids censorship while insuring that some member or members of the university community believe the invitee is a worthy spokesman of the views he or she espouses.

"more plausible" than Princeton's. (SB 13). But how can the legitimacy of governmental intrusion depend upon the particular educational philosophy in fact chosen? Why should Princeton's property be governmentally subjected to greater intrusion by strangers *because* it has chosen a particular philosophy than would otherwise have been the case?

That access by strangers to the facilities of Princeton is at least broadly related to Princeton's educational mission is not really disputed. The court below conceded as much when it measured Schmid's expressive activities against Princeton's educational philosophy. (JS 29a-31a). Princeton, rightly or wrongly, believed that its educational objectives were best served by requiring strangers who wished to engage in expressive activities on its property to be invited by a member of the University community to do so. Yet the court below rejected the invitational rule because, in the judgment of the court, activity like appellee's was consonant with Princeton's educational use of its property. Thus, the court substituted its own judgment for Princeton's judgment as to what uses of Princeton's property would further the educational objectives of Princeton's faculty and student body.

It is a disservice to education to treat a college campus as though it were a downtown area or a shopping center. The very authorities relied on by appellee uphold the university's need to regulate the expressive conduct that occurs on its campus:

> [B]ecause the university is an institutional embodiment of free inquiry and scholarship, it is something quite different from such public areas as parks and streets. It therefore requires regulation of the mode of exercise of the general freedoms of a libertarian society in order to protect its special functions. (This gives us the sorts of regulations of the rights of students and faculty that are necessary to keep the university from turning into Trafalgar Square.)[11]

The conditions of access are thus for the university, not for the state, to determine.

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[11] Searle, *Two Concepts of Academic Freedom*, in *The Concept of Academic Freedom* 93 (E. Pincoffs ed. 1972).

IV. THE DECISION OF THE COURT BELOW IS CONSTITUTIONALLY INDEFENSIBLE AND APPELLEE DOES NOT ATTEMPT TO DEFEND IT.

Many of the arguments in appellee's brief are arguments that this Court should not review the decision below on the merits. (SB 6-15). When he does discuss the merits, appellee seeks to narrow the decision below, change its rationale, and make it dependent on facts which were explicitly rejected by the Supreme Court of New Jersey.

The thrust of appellee's arguments on the merits is that students live on the Princeton campus, that most of them are voters, and that accordingly it is a legitimate exercise of state police power in implementation of free political speech to insure that students are politically informed. (SB 26-28, 32, 40-41). The argument was made below in an effort to extend *Marsh v. Alabama,* 326 U.S. 501 (1946), to residential universities and was not accepted by the Supreme Court of New Jersey. (JS 15a).

A state law which infringes First Amendment freedom of expression is justified only if it is supported by a *compelling* countervailing interest and is *closely drawn* to avoid unnecessary abridgment of the First Amendment right.[11a] *E.g., First National Bank v. Bellotti,* 435 U.S. 765, 786 (1978); *Wooley v. Maynard,* 430 U.S. 705, 715-17 (1977). The problem with appellee's argument as the basis for the exercise of state police power is that the court below did *not* justify appellee's access to the campus on the basis of a need to communicate political views to resident student voters. It explicitly found that no such need existed (because of the extent to which strangers have

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[11a] *Amicus curiae* AAUP contends that the state action at issue here was not "arbitrary." (AB 12-13). But where, as here, a statute derogates First Amendment rights, more than mere rationality is required of it.

access to students in frequented public places).[12] Nor did the court below limit its rule to protecting expression of political viewpoints on public issues. Nor did it confine its rule to residential universities. Nor did it, as appellee implies, simply require "that outside participants, under suitable restrictions on time, place, and manner, may *sometimes* be allowed to convey their views to *willing* students outside the classroom or the protected special space of the university."[13] (SB 30a) (emphasis added).

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[12] The court noted that the "numerous public areas [contiguous to University property] apparently furnished to members of the public, as well as the college community, ample alternative locations other than the property of the University itself as a means for the dissemination and exchange of information[,] views, and ideas." (JS 14a). It went on to hold that "the presence of such alternatives will not eliminate the constitutional duty [imposed by the New Jersey Constitution]" to reasonably accommodate speech and assembly by outsiders. (JS 28a). The same view has since been expressed by the Supreme Court of Pennsylvania in *Commonwealth v. Tate*, —Pa.—, 432 A.2d 1382, 1391 n.15 (1981) (adequacy of alternative, public forums would not relieve private college of its obligation under the Pennsylvania Constitution to allow access to strangers for leafleting; it would bear only on the reasonableness of any time, place, and manner restrictions imposed by college). In contrast, in *Robins v. Prune Yard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 345, 347 (1979), *aff'd*, 447 U.S. 74 (1980), the adequacy or inadequacy of alternative channels of expression was deemed material in deciding whether to subject a private property owner to a similar obligation. (The court specifically cited the decline of downtown shopping districts as producing a need for a public right of expression in private shopping centers.) See also *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566, 567 (1972) ("It would be an unwarranted infringement of [property owner's Fifth and Fourteenth Amendment rights] to require them to yield to the exercise of First Amendment rights where adequate alternative avenues of communication exist.")

[13] Both appellee and *amicus* assume that the court below confined its decision to the open campus and that it is not applicable to the classrooms or other "protected special space." (SB 30a; AB 18). Probably the Supreme Court of New Jersey would uphold otherwise permissible place and manner restrictions which reflected such a distinction. But there is nothing in the opinion below which would require that interpretation. Classrooms and lecture halls are used by non-faculty speakers invited by student organizations for lectures to which the general public is often invited. Presumably, that "property" is, conceptually, subjected to the same "affirmative obligation" of the state constitution. (JS 23a).

In short, appellee's argument is inapplicable to the case at bar, and he has not found any other basis on which to defend the decision below.

V. THE NEW JERSEY CONSTITUTION IMPERMISSIBLY INJECTS GOVERNMENT INTO CONTENT EVALUATION OF EXPRESSIVE ACTIVITY.

Princeton contends that the New Jersey Constitution as interpreted forces courts to evaluate the content of protected speech to determine the reach of the State's police power. The court below's interpretation of the New Jersey Constitution is particularly offensive in this connection because it forces not only courts but also law enforcement officials to massive evaluation of the content of speech—the speech of the property owner as well as that of the intruder—before the trespass laws can be invoked. Since each instance is different from its predecessors, consistency would be hard to achieve. Further, there would always be a temptation for law enforcement officials to find speech of which they approved consistent with the public and private use of property and speech of which they disapproved inconsistent. Substituting governmental judgments for private ones in these circumstances violates the First Amendment because it injects government into content evaluation over a broad spectrum of expression. This is a crucial difference between the New Jersey court's interpretation of its constitution in this case and the California court's interpretation of its constitution in *Robins v. Prune Yard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). If private property is, for reasons of public policy, to be subjected to an affirmative obligation to permit expressive activities, then the criteria for such an affirmative obligation should be neutral as to content. That is the approach of the California court in *Prune Yard* and of this Court in *Marsh*.

CONCLUSION

The decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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